

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

RODOLFO A. CONTRERAS,

Petitioner,

v.

J. W. SULLIVAN, Warden,

Respondent.

No. 1:19-cv-01785-NONE-JLT (HC)

ORDER DENYING PETITIONER'S
MOTIONS TO AMEND AND MOTION TO
STAY

(Docs. 23, 25, 32)

Petitioner moves to amend and stay proceedings due to alleged newly discovered evidence. The Court agrees with Respondent that the petition is untimely, and the Court finds that a stay and amendment would be futile. Thus, the motions are DENIED.

BACKGROUND

On July 28, 2020, the Court issued findings and recommendations to deny the petition for writ of habeas corpus. (Doc. 18.) On November 4, 2020, Petitioner filed a motion to amend the petition and a lodged third amended petition (Docs. 23, 24) and a motion for stay (Doc. 25). Respondent filed an opposition to Petitioner's motion to amend and motion to stay on November 17, 2020. (Doc. 28.) Petitioner again filed a motion to amend and lodged petition on November 23, 2020. (Docs. 32, 33.)

Petitioner's proposed third amended petition contains four claims: (1) sufficiency of the evidence, (2) admission of evidence, (3) unlawful sentencing, and (4) ineffective assistance of

trial counsel. (Docs. 24, 26.)¹ Claims one and two of the third amended petition appear identical to the claims in the second amended petition. Claims three and four appear to be new to the proposed third amended petition.

DISCUSSION

I. Motion to Amend

A petitioner may amend a petition for writ of habeas corpus once “as a matter of course,” and without leave of Court, before a response has been filed under Federal Rule of Civil Procedure 15(a), as applied to habeas corpus actions pursuant to 28 U.S.C. § 2242 and Rule 11 of the Rules Governing Section 2254 Cases. Calderon v. United States District Court (Thomas), 144 F.3d 618, 620 (9th Cir. 1998); Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995). Leave of Court is required for all other amendments. Rule Civ. P. 15(a). At the time Petitioner filed his motion, the petition had already been briefed, and indeed, findings and recommendations to deny all claims on the merits were pending before this Court for review. Therefore, pursuant to Rule 15(a), any amendment would only be permitted at the discretion of the Court.

In deciding whether to allow an amendment, the Court may consider “bad faith, undue delay, prejudice to the opposing party, futility of the amendment, and whether the party has previously amended his pleadings.” Bonin, 59 F.3d at 844-45 (applying Rule 15(a) in a habeas case). In this case, amending the petition now to add new claims would prejudice Respondent. The original petition was already briefed, and the findings and recommendations has already been issued. Additionally, the new claims raised in the proposed third amended complaint are untimely, and any amendment would be futile.

A. Limitation Period for Filing Petition for Writ of Habeas Corpus

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996. The AEDPA imposes various requirements on all petitions for writ of habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499 (9th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 586 (1997). The instant

¹ The third amended petition appears to have been split between Doc. 24 and Doc. 26. The first claim is included in Doc. 24, and the remaining claims are contained in Doc. 26, beginning at page 7.

petition was filed on December 23, 2019, and thus, it is subject to the provisions of the AEDPA.

The AEDPA imposes a one-year period of limitation on petitioners seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). In most cases, the limitation period begins running on the date that the petitioner's direct review became final. In this case, the California Supreme Court denied his petition for review on February 20, 2019. Therefore, direct review concluded on May 21, 2019, when the ninety-day period for seeking review in the United States Supreme Court expired. Barefoot v. Estelle, 463 U.S. 880, 887 (1983). The statute of limitations commenced on the following day, May 22, 2019. Absent applicable tolling, the last day to file a federal habeas petition was May 21, 2020. The new sentencing claim and ineffective assistance of counsel claims that Petitioner seeks to raise in the third amended petition are therefore time barred and allowing amendment or stay of the proceedings would be futile.

B. Statutory Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

Under the AEDPA, the statute of limitations is tolled during the time that a properly filed application for state post-conviction or other collateral review is pending in state court. 28 U.S.C. § 2244(d)(2). A properly filed application is one that complies with the applicable laws and rules governing filings, including the form of the application and time limitations. Artuz v. Bennett, 531 U.S. 4, 8 (2000). An application is pending during the time that "a California petitioner completes a full round of [state] collateral review," so long as there is no unreasonable delay in the intervals between a lower court decision and the filing of a petition in a higher court. Delhomme v. Ramirez, 340 F. 3d 817, 819 (9th Cir. 2003), *abrogated on other grounds as recognized by* Waldrip v. Hall, 548 F. 3d 729 (9th Cir. 2008) (*per curiam*); *see* Evans v. Chavis, 546 U.S. 189, 193-194 (2006); Carey v. Saffold, 536 U.S. 214, 220, 222-226 (2002); Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999).

Petitioner did not file any state collateral actions. Therefore, Petitioner is not entitled to statutory tolling, and the instant petition remains untimely.

C. Equitable Tolling

The running of the one-year limitation period under 28 U.S.C. § 2244(d) is subject to equitable tolling in appropriate cases. *See* Holland v. Florida, 560 U.S. 631, 651-652 (2010);

1 Calderon v. United States Dist. Ct., 128 F.3d 1283, 1289 (9th Cir. 1997). Equitable tolling may
 2 be granted when “extraordinary circumstances beyond a prisoner’s control make it impossible to
 3 file the petition on time.” Shannon v. Newland, 410 F. 3d 1083, 1089-1090 (9th Cir. 2005)
 4 (internal quotation marks and citations omitted). “When external forces, rather than a petitioner’s
 5 lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of
 6 limitations may be appropriate.” Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999).
 7 “Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1)
 8 that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood
 9 in his way.” Holland, 560 U.S. at 655; Pace v. DiGuglielmo, 544 U.S. 408, 418 (2005). “[T]he
 10 threshold necessary to trigger equitable tolling under AEDPA is very high, lest the exceptions
 11 swallow the rule.” Miranda v. Castro, 292 F. 3d 1062, 1066 (9th Cir. 2002) (citation omitted).
 12 As a consequence, “equitable tolling is unavailable in most cases.” Miles, 187 F. 3d at 1107.

13 Petitioner makes no claim to entitlement of equitable tolling and the Court finds no basis
 14 for it. Petitioner must demonstrate diligence throughout the limitations period (Lacava v. Kyler,
 15 398 F.3d 271, 277 (3rd Cir. 2005)), but failed to do so. He failed to demonstrate any
 16 extraordinary circumstance stood in his way of timely filing his amended federal petition, and he
 17 failed to show that he acted diligently. He should not be granted equitable tolling.

18 II. Motion for Stay and Abeyance

19 Petitioner asserts that his sentencing claim and ineffective assistance claims are based on
 20 newly discovered evidence because he discovered new “case law.” (Doc. 26 at 9-10.) However,
 21 Petitioner does not elaborate further and does not present any new evidence in his third amended
 22 petition. Petitioner’s motion to stay cites to People v. Cook, 60 Cal. 4th 922 (2015), as the basis
 23 of his new claims. (Doc. 25 at 2.) As Respondent contends, Petitioner’s discovery of a 2015
 24 California case does not constitute a “new” factual predicate. (Doc. 28 at 3.) As Respondent
 25 points out, the case predates Petitioner’s conviction making it reasonably discoverable at the time
 26 of his conviction. (Id.) Respondent, citing to Fed. R. Civ. Proc., R. 15(c), asserts that if an
 27 amended petition is not filed within the limitation period, a claim in that amended petition may
 28 proceed only to the extent it is based on facts that were alleged in a petition that was filed within

1 the limitation period. (Id. at 4.) Accordingly, as Respondent correctly asserts, the sentencing and
2 ineffective assistance of counsel claims in the third amended petition are based on different facts
3 than the claims in the second amended petition. (Id.) Respondent alleges that Petitioner's new
4 claims assert facts regarding Petitioner's sentencing proceeding and the amount of preparation
5 counsel undertook prior to trial, and these facts are not contained in either Petitioner's current
6 sufficiency of the evidence or admission of evidence claims. (Id.) Therefore, the new claims do
7 not relate back to Petitioner's current claims.

8 Moreover, as previously discussed, the petition is untimely so amendment would be futile.
9 Bonin v. Calderon, 59 F.3d 815, 845 (9th Cir. 1995). Thus, the Court does not find good cause to
10 grant a stay of proceedings, see Rhines v. Weber, 544 U.S. 269 (2005), or to permit an
11 amendment to the petition. Fed. R. Civ. P. 15(a); Bonin, 59 F.3d at 845.

12 **ORDER**

13 Accordingly, the Court **ORDERS** that the motions to amend (Docs. 23, 32) and motion to
14 stay (Doc. 25) are **DENIED**.

15
16 IT IS SO ORDERED.

17 Dated: **January 12, 2021**

/s/ Jennifer L. Thurston
UNITED STATES MAGISTRATE JUDGE